

82-1386

Office-Supreme Court, U.S.

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FEB 16 1983

IN THE SUPREME COURT OF THE UNITED STATES STEVAS,
CLERK

TOM FIELDS,

Appellant

vs.

No.

Term: 1982-83

SUMMIT ENGINEERING,

Appellee.

On Appeal From

The Supreme Court of the State of Montana

JURISDICTIONAL STATEMENT

COUNSEL OF RECORD:

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(pro se) for Appellant

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QUESTIONS PRESENTED BY APPEAL

A. QUESTIONS RELEVANT TO MONTANA SUPREME COURT RULINGS

1. Rule 5 of the Montana Rules of Appellate Civil Procedure says:

"The running of the time for filing a notice of appeal is suspended...and the full time for appeal fixed by the rule commences to run and is to be computed from mailing by the clerk of notice of entry of any of the following orders... granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of judgement would be required if the motion is granted..."

Did the Montana Supreme Court err by not abiding by this rule and, in light of the extensive effort which Fields made to point out to the Court its error, deprive Fields of due process as guaranteed under the Fifth and Fourteenth Amendments?

2. If the Montana Supreme Court did not so err, then did the Court construe its rules narrowly in order to determine Fields' appeal on questions of

procedure rather than on its merits,
and so deprive Fields of due process?

- 3a) Did the Montana Supreme Court act arbitrarily in ordering the appellant to buttress his appeal by further research of the law and then, after Fields accomplished that work, dismiss his appeal on a procedural question that would normally be the Court's first consideration?
- b) Is it not likely that the Court first checked Fields' appeal for its timeliness, found no fault there, asked for the additional research, and then, after its order was followed, went back, found fault with Fields' appeal, and deprived Fields of due process?
4. If the Montana Supreme Court did not so err, then are not its rules a trap for the unwary and so result in the Court depriving Fields of due process?

B. QUESTIONS RELEVANT TO GALLATIN COUNTY DISTRICT COURT RULINGS

- 1a) Were not the trial court's facts
clearly erroneous?
- b) Was Fields deprived of due process because the trial court failed to comply with Rule 52(a) of its Rules of Civil Procedure and amend its findings of fact?
- 2a) Did the trial court fail to cite findings relevant to the issue of overtime compensation?
- b) Is not the failure to make findings grounds for reversal?
- c) Was Fields deprived of due process because the trial court failed to comply with Rule 52(a) of its Rules of Civil Procedure which requires the Court to make such findings?
3. From the transcript it is clear that, at both the start (page 19T) and finish (page 170T) of the hearing in trial court, it was understood by the pre-

siding judge that in the matter of Fields' claim to ownership of his personal file, "It's a question of trade secrets." Furthermore, at the conclusion of the hearing he also raised the relevancy of precedent set forth by the way the military handles similar material (page 170T):

"The old military, we used to use the confidential secrets and super secrets...".

Yet, in regards to the question of trade secrets, the Court has totally ignored all the material briefed by Fields and also the only exhibit introduced by either side as a basis for determining whether or not trade secrets are involved. And in regards to using the military as a precedent, Fields has submitted to the Court a letter from the Montana Air National Guard permitting him to introduce material relevant to the question of trade secrets, but so far the Court has not

shown a willingness to consider such material. Has not Fields been deprived of due process by the Court's neglect of such standards, of relevant testimony, and law?

4. Even though the crucial matter bearing on the issue of ownership was the involvement of trade secrets, the trial court repeatedly obstructed Fields' attempts to describe the contested notes in enough detail for the Court to be able to decide the issue. Instead, it was the Court's prejudice that (page 22T), "The documents speak for themselves." Was Fields deprived due process by the Court's interference with his testimony?
5. Has Fields been deprived of the equal protection of the laws by the trial court's failure to follow applicable precedents? (These precedents are discussed in the Appellant's Substitute Brief. See appendix.)

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16A CJS 569(4), 579

21 CJS 177, 282

14 CJS SUPP 150, 244

21 CJS 177, 281

16A CJS 569(4), 572

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16A CJS 569(1), 559

16A CJS 569(4), 579

JURISDICTIONAL GROUNDS

The following judgements are being appealēd:

1. From the Supreme Court of the State of Montana, regarding case 82-96:
 - a) Denial of 2nd petition for rehearing 6 Jan 83
 - b) Denial of 1st petition for rehearing 7 Dec 82
 - c) Dismissal of appeal 9 Nov 82
2. From the District Court of the Eighteenth Judicial District of the State of Montana, Gallatin County, regarding case 27689 (which was the subject of case 82-96 in the Montana Supreme Court):
 - a) Denial of post-trial motion
2 Feb 82
 - b) Judgement 6 Nov 81
(Noticed on 12 Nov 81)

This appeal was filed with the clerk of the Montana Supreme Court and the clerk of Gallatin County District Court on 17 Jan 83.

Jurisdiction to hear this appeal has been

conferred upon the Court by the Fifth and Fourteenth Amendments:

"No person shall...be deprived of life, liberty, or property, without due process of law."

(Fifth Amendment)

"...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(Fourteenth Amendment)

If these grounds for appeal are deemed insufficient, then the Court is begged to consider this jurisdictional statement as a petition for certiorari.

STATEMENT OF CASE

Fields raised two issues in the District Court:

1. The contested ownership of a personal file composed by Fields over a 2 - 3 year period and dealing with his work at Summit Engineering over the same period
2. Overtime compensation owed Fields by Summit Engineering for the composition of these notes--especially if they are awarded to Summit Engineering

Legal authorities supporting Fields' position on these issues have been quoted in the (substitute) appellant's brief which Fields submitted to the Montana Supreme Court and which he has included in the appendix to this brief.

A. ON THE ISSUE OF OWNERSHIP

The issue of ownership was raised by Fields first before the Justice of the Peace and again before the Gallatin County District Court after notes he had loaned to Summit Engineering were not returned to him as promised.

Fields has presented evidence and testimony

that:

1. He compiled the personal file on his own time.
2. His employer had ample opportunity to examine the file.
3. His employer encouraged the study that went into the making of the file.
4. His employer had acknowledged his right to ownership by various acts, including his final request to borrow the notes after Fields had terminated his employment.

Summit Engineering has argued that the notes belong to it because:

1. Fields was its employee.
2. Fields had signed an employee disclosure agreement.
3. The notes include confidential material.
4. The notes are Fields' work product.

Fields answered these arguments by pointing out that:

1. The agreement explicitly addressed Sum-

mit Engineering's right to inventions and trade secrets.

2. The agreement did not preclude Fields from composing a personal file that did not disclose inventions and trade secrets.
3. The contested file does not reveal inventions or trade secrets.
4. The notes are not Fields' work product, although they do include copies of that work product.

B. ON THE ISSUE OF OVERTIME COMPENSATION

The issue of overtime compensation was raised by Fields before the Justice of the Peace and again before the District Court. Because the Justice of the Peace had not ruled upon this issue, it was separately addressed in a supplemental complaint presented to the District Court. Summit Engineering objected to the admission of this complaint because Fields' attorney failed to present it to the Court until the day of the trial. This objection was not sustained because the issue had been

raised even before the supplemental complaint, because Summit Engineering had been informed of the complaint well ahead of trial, and because Summit Engineering had come to trial prepared to answer the complaint which, had it not been consolidated in the present case, would have been tried separately anyways.

Fields argued that he had never asked for compensation for work he did on his own time composing the file. Witnesses gave testimony that he did work on his own time.

Summit Engineering argued that it owed no overtime because Fields never requested any, and that had Fields requested compensation, it would have been denied.

Fields argued that since various co-workers were aware of the overtime Fields was working, so must have been his supervisor whose desk was no more than ten feet from his own.

Although Fields did not keep a record of the additional hours he worked on Summit material, there is a partial record of these hours

which Fields did not think of subpoenaing during the trial. This record is an evening and weekend sign-in sheet maintained by Summit.

While this record will not show the extra hours which Fields worked immediately before and after the workday began, or during lunch, it would positively establish that Fields did work extra hours for which he was not compensated. Should this record have been destroyed, it is possible that the night watchmen could recall that Fields worked this overtime.

Fields' claim to overtime compensation was originally restricted to just the period during which he was paid on an hourly basis, because he had been instructed at the time he was placed on a monthly salary that extra work, for which no overtime would be paid, was expected (see page 51T). It was not until after the trial court hearing that Fields learned, while doing the research ordered by the Montana Supreme Court, that the popular notion that salaried employees are not entitled to overtime compensation was a misconception and

that he was entitled to compensation over the entire period of his employment. So far no court has considered the question of compensation over this latter period of Fields' employment, although Fields did raise it in his substitute appellant brief to the Montana Supreme Court.

C. ON FIELDS' POST-TRIAL MOTIONS, APPEAL, ETC.

In effect, the trial court ruled that everything Fields did while at Summit Engineering involved trade secrets and that Fields had done no work beyond the eight hours a day for which he had already been compensated. This ruling, like the findings of fact and memorandum issued by the trial court, was clearly erroneous and forced Fields into the position of having to make post-trial motions (see Fields' first appellant's brief to the Montana Supreme Court), of having to appeal to the Montana Supreme Court and now to the U.S. Supreme Court.

The Montana Supreme Court dismissed Fields' appeal on the procedural grounds that it was

not timely. In the appendix there is included a copy of Fields' second petition for rehearing which clearly demonstrates how far astray the Court has gone to construe its rules in order to dismiss this case. (As noted by Justice Sheehy in his order denying Fields' second petition, the Montana rules do not provide for a second petition for rehearing. The second petition was made at the suggestion of one of the Supreme Court judges after Fields had convinced the assistant clerk of the court that the opinion written by Justice Sheehy in dismissing Fields' appeal was obviously erroneous. What first impressed the clerk was Justice Sheehy's statement that Fields had failed to file a notice of hearing on his post-trial motion; the notice of hearing on motions is usually filed by the clerk, the rules pertaining to Fields' action did not require Fields to notice-up the hearing, and the notice of hearing was properly issued by the clerk and in the court file. What also impressed the clerk was Rule 5 of the Montana

Rules of Appellate Civil Procedure which very clearly and unambiguously defines the time in which Fields had to make his appeal following his post-trial motion. Finally, the clerk was impressed by Judge Sheehy's insistence upon applying the time limitation of Rule 59(g) pertaining to motions to amend the judgement although Fields made no such motion but instead made a motion under Rule 52(b) to amend the findings; Justice Sheehy has insisted that a motion to amend the judgement is implicit in Fields' motion and so its timing limitation must apply.)

In response to Fields' second petition, Justice Shea (not to be confused with Justice Sheehy) has written:

"I would reinstate the appeal...on closer analysis...I believe we improperly dismissed the appeal on jurisdictional grounds...Rule 52 does not provide that both motions are subject to the time limitations in Rule 59(d)...The motion deadlines under our rules have become nothing more than traps...in favor of keeping a party in court so that the appeal can be heard on the merits."

Regarding this case and Justice Shea's opinion

it was reported in a local newspaper that there has recently been a rash of cases thrown out for failure to comply with Rule 59 and that a bar association committee is now studying ways of revising it. Clearly, there is a defect in this area of the Montana rules or the way the rules are being construed.

Fields asserts that the rules are unambiguous, that the Montana Supreme Court has deprived him of due process, and that his position is supported by numerous authorities:

"Where procedure prescribed by state actually affords character of due process contemplated by federal constitution... not followed, the right has been violated.

16A CJS 569(4), 579

"Appellate court must construe its rules liberally so that causes on appeal may be determined on merits...rather than on questions of procedure."

21 CJS 177, 282

"...court rules...should not be construed too strictly or too literally, but should be liberally and reasonably construed so as to promote rather than defeat justice. They will not, however, be construed so as to favor a negligent and penalize a diligent party."

21 CJS 177, 282

"Pro se pleading in a civil rights action must be viewed without regard for technicalities, and such pleadings should be accorded a liberal construction."

14 CJS SUPP 150, 244

"The supreme court rules are not intended to create a trap for the unwary, but merely to facilitate review of cases in such court."

21 CJS 177, 281

"'Procedural due process' means, in the due course of legal proceedings, according to those rules and forms which have been established...."

16A CJS 569(4), 572

"Due process of law does not mean according to the whim, caprice, or will of a judge...; it means according to the law."

16A CJS 569(4), 577

"The test of due process is essentially a test of reasonableness."

16A CJS 569(3), 569

"The constitutional guarantee of due process is intended to protect the individual against arbitrary exercise of governmental power...."

16A CJS 569(1), 559

"The construction of court rules is for the court which enunciates them, and while it has been held that such construction is not final but is subject to revision by an appellate court, the general rule is that a court's construction of its own rules will not be interfered with by a higher court in the absence of a clear abuse of power or manifest and material

error, such as a construction which violates the plain terms of the rule...."

21 CJS 177, 281

"No change in rules of procedure can be made which disregards the fundamental principles which have relation to the process of law...and guard him against the arbitrary action of the government."

16A CJS 569(4), 579

PLENARY CONSIDERATION

In addition to disregarding their own rules, the Montana courts have ignored all the evidence and testimony presented on Fields' behalf; they have refused to acknowledge errors in their findings of facts and in their application of the rules. It is clear that the state courts are unable to proceed impartially. Consequently, if this case is merely remanded to the state, it is almost certain to end up in another series of costly appeals. The trial court was of the opinion that Fields had no more right to a personal file than, "...an employed ranch hand or gardener...to the produce raised." This opinion would treat information like wheat or barley--as if it could satisfy only one appetite. Such an opinion is simply inconsistent with the laws concerning the protection of information. While an employer certainly has a right to protect trade secrets, he does not have the right to treat everything as a trade secret and he certainly has the responsibility to

distinguish confidential material from non-confidential. This practice has long been followed by the military and its contractors in connection with its technical literature, and there is no reason why it should not be adhered to in the present case.

Persons employed in technical areas have technical interests, and it must be expected that they will learn what they can from their work. It is also to be expected that they will make a record of what they learn. The trial court has ruled, in effect, that Fields was not allowed to keep such a record even though he was never so informed, even though it was evident to Fields' employer that he was going to have to learn on the job, even though it was obvious that Fields was keeping such notes, and even though these notes were never hidden from his employer who could have discussed them with Fields at any time during his employment. The trial court has also ruled that Fields must give his notes to his employer without any kind of compensa-

tion for his own time invested into making these notes. The court suggested in its memorandum that Fields had been compensated by raises, but the evidence will not support this opinion. Fields held a college degree in physics, had done graduate work in physics, was given principal responsibility for a new product, and was credited by personnel in the sales department with saving the project, yet he never earned more than \$7.00/hour and never applied for higher paying jobs in the same company though urged to do so by other employees. Fields was happy just to have a job where he could learn while earning enough to get by on.

There is a great deal more to the trial court's record than has been transmitted in the appendix. A transcript has been prepared at Fields' expense. Also, there is Fields' post-trial motion without which the trial court's findings of fact and conclusions of law will be very misleading. And there is the contested material itself which still awaits comparison

to the various standards that have been offered to the Court (Apple computer documentation, included in the exhibits, and Montana Air National Guard weapon control system documentation). It is Fields' hope that this court will call up the complete record.

CERTIFICATE OF MAILING

I, Thomas M. Fields, appellant, hereby certify that I have mailed on this 7th day of February, 1983 a copy of this jurisdictional statement upon the attorney for the appellee:

Mark Bryan
11 E. Main
P.O. Box 1371
Bozeman, MT 59715

Thomas M. Fields
Thomas M. Fields

Appellant (pro se)

Jann Brinker

NOTARY PUBLIC for the State of Montana

Residing at Helena, Montana

My Commission Expires January 3, 1985

IN THE DISTRICT COURT OF THE EIGHTEENTH
JUDICIAL DISTRICT OF THE STATE OF
MONTANA, IN AND FOR THE COUNTY OF
GALLATIN

TOM FIELDS,)	
)	
Plaintiff,)	
)	
vs.)	No. 27689
)	
SUMMIT ENGINEERING,)	
)	
Defendant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been tried by the Court sitting without a jury, the Court does hereby Find the Facts and states separately its Conclusions of Law thereon and directs entry of appropriate Judgement as follows:

FINDINGS OF FACT

1.

About December 14, 1979, Tom Fields was employed by Summit Engineering; at that time of employment he signed an "employee invention and disclosure agreement" he worked in

the engineering department of Summit Engineering; part of his duties were to make notes and diagrams on electrical projects in progress; he made these notes and diagrams as required by his employment on material supplied to him by Summit in the course of his employment; some notations were made on documents which were confidential documents in and of themselves and bear a legend upon the face of the document indicating the confidentiality of the documents; other notations and diagrams were made on paper or documents supplied by Summit Engineering and performed by Fields in the regular and normal course of his employment.

2.

Tom Fields terminated his employment with Summit Engineering and left the premises on a Friday evening, taking with him two box loads full of documents.

3.

The documents consisted of materials supplied to him during his employment and in-

cluded binders bearing the logo "Summit Engineering"; papers and supplies belonging to Summit, various other papers and documents, all of which were supplied by Summit Engineering to him.

4.

The documents, papers and material were removed from Summit Engineering without its consent.

5.

The documents were taken to his home, and he continued to possess them until requested by Summit Engineering to return the documents so that they could be reviewed.

6.

He returned the documents to Summit Engineering, who reviewed the documents and found the extent and nature of the documents removed by him and then refused to return the documents to him.

7.

Summit Engineering contends it needed the documents which were part of projects in

progress and that the removal by plaintiff causes damage to defendant in loss of employee time and reproducing and reconstructing the documents removed by plaintiff.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

I.

The notebooks taken by Fields are the property of Summit Engineering.

II.

Defendant shall be awarded its costs incurred in this cause.

III.

Plaintiff shall take nothing by way of his complaint.

Let the attorney for the Defendant prepare the appropriate Judgement.

DATED this 4th day of November, 1981.

IN THE DISTRICT COURT OF THE EIGHTEENTH
JUDICIAL DISTRICT OF THE STATE OF
MONTANA, IN AND FOR THE COUNTY OF
GALLATIN

TOM FIELDS,

Plaintiff,

vs.

No. 27689

SUMMIT ENGINEERING,

Defendant.

M E M O R A N D U M

The facts are simple. The plaintiff worked for the defendant. At the time of his employment he signed a nondisclosure agreement; when he left his employment without notice, he left a note indicating he was quitting and took his workbooks with him. He then returned them for review and Summit refused to return them. This appeal from the original action below is the result.

Tom Fields, a self-educated man, has a keen intellect. As he worked he made exact

and voluminous notes. The record before the Court indicates as an employed text writer, technician, and junior engineer. He was to make written notes on plans or writing which were substantially completed; these notes and diagrams were integrated into the production of certain electronic systems of which Dana and Summit Engineering have contracted to produce for customers. The final product will not be placed on the market until approximately November, 1981. The information that plaintiff has requested is confidential in nature and is of sufficient detail and exactness that might be taken to a competitor and sold.

The "bouncing ball" of title is always interesting and complex. Here the very contract of Fields (and for which he received wages) was to devote his employed time to the development of the process or program in question.

"The rule appears to be well settled that one who discovers a new principle or improvement in a machine or

composition is not to be deprived of the benefits of that discovery because he employs others to perfect the details and put his conception into practical form." 53 AmJur 2d, Master and Servant, Section 114.

Title was in Summit originally; his work did not pass title any more than an employed ranch hand or gardener acquires title to the produce raised; the originality, if any, was part of the integrated produce.

The general rule applies here.

"It is not uncommon for the master to require, as part of the contract of employment, that the servant shall expressly agree that any inventions or improvements made by the latter during the employment shall belong to the former; and various cases involve express contract provisions to this effect. The validity of such an agreement has been affirmed as against numerous grounds of objection." 53 AmJur 2d, Master and Servant, Section 115.

"If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer." *Solomons v. United States*, 137 U.S. 342, at 346, 34 L.Ed. 667, 669, 11 Sup. Ct. Rep. 89.

Here the very object of his employment was to perform that for which he now claims ownership.

I do not find conversion here.

DATED this 4th day of November, 1981.

No. 82-96

IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

TOM FIELDS,

Plaintiff and Appellant,

-vs-

SUMMIT ENGINEERING,

Defendant and Respondent.

Appeal from: District Court of the Eighteenth
Judicial District, In and for
the County of Gallatin, The Hon-
orable W. W. Lessley, Judge pre-
siding.

Counsel of Record:

For Appellant:

Tom Fields, Pro Se, Helena, Montana

For Respondent:

Mark A. Bryan, Bozeman, Montana

Submitted on Briefs: Septem-
ber 30, 1982

Decided: Novem-
ber 9, 1982

Filed: NOV 9-1982

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

This is an appeal from a judgement issued by the District Court of the Eighteenth Judicial District, Gallatin County, denying appellant's claim for engineering notes and other documents which he compiled while working for respondent and claimed were part of his personal file.

Tom Fields, appellant, was employed by respondent, Summit Engineering, to write technical manuals based on notes he had taken on various electrical projects. Fields claims that some of these notes were made for his educational purposes during overtime and are therefore his personal property.

Summit Engineering claims that all of the work done by Fields is its property, in that it is confidential and covered by an "Invention and Disclosure Agreement" signed by Fields.

On July 23, 1981, Fields commenced this action for the return of the materials. On

November 6, 1981, notice of entry of judgment was duly served upon both parties. On November 20, 1981, Fields filed a motion to amend the findings of the court. Fields failed to file a notice of hearing on the motion to amend the findings of the District Court. A hearing on his motion was held February 1, 1982, and the court denied these amendments on February 2, 1982. On February 9, 1982, Fields filed his notice of appeal to this Court.

On the record, Fields raises several issues, including whether the notes and materials collected by Fields during overtime are the property of Summit, whether Fields should be compensated for overtime work and whether there is substantial evidence to support the District Court's judgement.

However, the dispositive issue is whether the appeal is timely.

Rule 59(d), M.R.Civ.P., states in part:

"If the motion is not noticed up for hearing and no hearing is held thereon, it shall be deemed denied as of the

expiration of the period of time within which hearing is required to be held under this Rule 59."

Rule 59 also provides that:

"A hearing on the motion shall be had within 10 days after it has been served...."

In the present case, Fields did not file a notice of hearing on the motion to amend the findings of the District Court. Therefore, his time to appeal began to run on November 30, 1981, ten days after he filed his motion. Rule 5, M.R.App.P. His time to file his appeal ended on December 30, 1981, and his notice of appeal was not filed until February 12, 1982.

This Court does not have jurisdiction and therefore cannot reach the merits of his appeal since it was not filed within the time provided by the rules. Winn v. Winn (1982), ___ Mont. ___, ___ P.2d ___, 39 St.Rep. 1831; Malinak v. Safeco Ins. Co. (Decided November 9, 1982) No. 81-196; Leitheiser v. Montana State Prison (1973), 161 Mont. 343, 505 P.2d 1203.

The appeal is dismissed.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 82-96

TOM FIELDS,

Plaintiff and Appellant,

v.

SUMMIT ENGINEERING,

Defendant and Respondent.

O R D E R

PER CURIAM:

Appellant's second petition for rehearing and motion to suspend rules is denied.

DATED this 6th day of January, 1983.

Mr. Justice John C. Sheehy concurring:

The appellant has no grounds upon which to establish a reinstatement of his appeal.

Our rules do not provide for a second petition for rehearing, although I would grant that in extraordinary situations the rules might be set aside. This case is not in that

category, however.

In the papers which appellant submitted with his second application, it appears positively that he submitted to the District Court a motion for new trial along with his motion to amend the findings of fact. This clearly brings him within the time limitations of Rule 59(g), M.R.Civ.P. Since those time limitations expired before appellant filed his notice of appeal, we simply have no jurisdiction of his cause.

Appellant is appearing "pro se" (he means in propria personam). That factor is not an exception to compliance with the jurisdictional rules. I have tried to explain this to the appellant personally, and to an interested reporter, but to no avail.

Mr. Justice Daniel J. Shea, dissenting:

I would reinstate the appeal.

Defendant's appeal was here on the merits and it was not until we dismissed the case on a jurisdictional ground that he was even

aware that he may not have timely filed his appeal. He timely filed his petition for rehearing, however, and we denied it. I agreed that his petition for rehearing should be denied, but now, on closer analysis, I believe I was in error and that we should have granted his petition for rehearing. Because I believe we improperly dismissed the appeal on jurisdictional grounds, I would find no impediment to reinstating the appeal.

Fields filed a Rule 52 motion to amend findings, and, unlike Rule 59, there is no provision in Rule 52 whereby the trial court loses jurisdiction if it fails to rule within a certain time. Under Rule 5, M.R.App.Civ.P., the time for filing a notice of appeal is suspended until the trial court rules on the Rule 52 motion to amend the findings. This is true whether or not the judgement would be altered if a motion is granted.

Fields filed a timely Rule 52(b) motion to amend findings on November 20, 1981. On February 2, 1982, the trial court ruled on

that motion. Seven days later Fields filed his notice of appeal. Rule 52 provides that a motion under this rule may be made together with a Rule 59 motion for a new trial. However, by filing a motion for new trial under Rule 59, Rule 52 does not provide that both motions then are subject to the time limitations in Rule 59(d).

Fields, a layman, made a good faith attempt to proceed under the rules. If he had filed his notice of appeal before the trial court ruled on his motion to amend findings, the trial court would have lost jurisdiction to amend the findings, even though the amended findings would not have affected the judgment. The motion deadlines under our rules have become nothing more than traps for all but the most sophisticated practitioner. Where there is doubt, that doubt must be resolved in favor of keeping a party in court so that the appeal can be heard on the merits.

There is sufficient doubt here. I would reinstate the appeal and hear it on the merits.

IN THE SUPREME COURT OF THE UNITED STATES

No.

TOM FIELDS,

Appellant

vs.

SUMMIT ENGINEERING,

Appellee

-----APPEAL FROM: SUPREME COURT OF THE
STATE OF MONTANA

-----NOTICE OF APPEAL

COUNSEL OF RECORD:

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Attorney for Appellee

JUDGEMENT(S) BEING APPEALED

The following judgements are being appealed:

1. From the Supreme Court of the State of Montana, regarding Case 82-96:
 - a. Denial of 2nd petition for rehearing:
6 Jan 83
 - b. Denial of 1st petition for rehearing:
7 Dec 82
 - c. Dismissal of appeal: 9 Nov 82
2. From the District Court of the Eighteenth Judicial District of the State of Montana, Gallatin County, regarding Case 27689 (which was the subject of Case 82-96 in the Montana Supreme Court):
 - a. Denial of post-trial motions: 2 Feb 82
 - b. Judgement: 6 Nov 81
(Noticed on 12 Nov 81)

STATUTES UNDER WHICH APPEAL IS TAKEN

Fifth and Fourteenth Amendments

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 82-96

TOM FIELDS,

Plaintiff-Appellant,

vs.

SUMMIT ENGINEERING,

Defendant-Respondent.

ON APPEAL FROM THE DISTRICT COURT
OF THE EIGHTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR
THE COUNTY OF GALLATIN

BRIEF OF PLAINTIFF-APPELLANT

TOM FIELDS
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Leisure Village
Helena, MT 59601

Plaintiff-Appellant
(pro se)

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STATEMENT OF PROCEDURAL ISSUES

- 1a. Has the trial court been influenced by material not presented anywhere in the trial record prior to its appearance in that court's trial memorandum?
 - b. Has Fields suffered because of such outside influence?
 - 2a. Has the trial court cited any facts to support its decision to not award the overtime compensation claimed by Fields?
 - b. Should the trial court decide the major issues of a case without stating the facts bearing on the issues?
 - 3a. Are the trial court's facts representative?
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STATEMENT OF FACTUAL ISSUES

- 1a. What are the contested materials?
- b. Has Summit Engineering presented any evidence that its products and Fields' work

constituted inventions, improvements, or discoveries?

- c. Has Summit Engineering presented any evidence that Fields has violated either its employment contract or its employee invention and disclosure agreement?
- 2. Do the contested materials belong to Fields or to Summit Engineering?
- 3a. Did Fields invest his own time in creating and/or compiling the contested materials?
 - b. If so, has Fields been compensated for this additional time?
 - c. If Fields has performed such service, and if Summit Engineering is awarded the contested materials, then isn't Fields owed compensation?

DISCUSSION OF PROCEDURAL ISSUES

- 1a. The following statement found in the trial court's memorandum is not supported by any testimony or evidence:

"The final product will not be placed on the market until approximately November, 1981."

- b. The assertion just quoted addresses a basic attribute of the contested material; it is false, as explained by Fields in the Plaintiff's Post-Trial Motions (page 4, para E and page 12). Fields did not have the opportunity to challenge such material until after the decision had been entered. Even then, the trial court chose to remain silent concerning its impropriety.
2. The trial court has cited such facts as that Fields was employed by Summit Engineering, that Fields signed an "Employee Invention and Disclosure Agreement", and that he made notes and diagrams as required by his employment. Yet Summit Engineering has not claimed, nor has it presented evidence, nor has the court cited

evidence that:

- a. The contested materials are the same as those prepared by Fields for Summit Engineering.
- b. The materials, those contested and those definitely prepared by Fields for Summit Engineering, were created and/or compiled solely on company time.

On the other hand, it was testified that:

- a. Employee notes were not controlled:

Transcript, page 70:

Q. "...What usually becomes of those notes?"

A. "...they're either put on file or disposed of."

Transcript, page 70:

Q. "Why don't you provide those notes to the company?"

A. "...there has been no requirement to such thing."

- b. Fields' supervisor knew that he was using the copier more than his job required:

Transcript, page 144:

Q. "...a lot of copying work?"

A. "Much more than I wanted him to."

- c. Fields' supervisor did not object to Fields' keeping personal notes; furthermore, he had the opportunity to see the notes, but never took it.

(Transcript, page 148)

- d. Fields did work more than the eight hours per day for which he was paid:

Transcript, page 70:

- Q. "...amount of time that Tom spent compiling those notebooks?"
A. "Every evening, every weekend, every morning."

Transcript, page 74:

- Q. "...what was he working on?"
A. "...constant reference to work with Summit..."

Transcript, page 87:

- Q. "...observe the plaintiff during lunch hour?"
A. "...worked through the lunch hour...I just saw him writing..."

Transcript, page 92:

- A. "...Tom was coming in early..."

Transcript, page 145:

- A. "I was aware that he was putting in hours...I thought it was study."

- e. Summit not only knew that Fields was

putting in extra hours but also was motivated to let him for its own gain:

Transcript, page 153:

A. "He asked me if he could spend extra hours at Summit, studying the books."

A. "...for his own benefit."

Witness. "...knowledge he gains certainly can't hurt Summit. That's why we allowed him to come in."

3. The trial court's facts are not representative, nor are its conclusions of law appropriate. A great deal of effort has already been expended by Fields in the Plaintiff's Post-Trial Motions (Plaintiff's Proposed Amended Findings of Fact) to indicate how unrepresentative the trial court's factual summary is. Rather than repeat that material here, one more significant discrepancy in the trial court's findings of fact will be introduced here. According to item 5 in the trial court's factual summary, Fields was "...requested by Summit Engineering to return the documents so that they could be reviewed."

However, according to the testimony, Summit Engineering never asked for such a sweeping review of the documents.

Transcript, page 152:

Q. "What were you requesting?"

A. "Just a data sheet..."

DISCUSSION OF FACTUAL ISSUES

1. Fields has testified that the contested materials fall into three broad categories (transcript, page 163; Plaintiff's Post-Trial Motions, Other Review Considerations, page 2; Plaintiff's Post-Trial Motions, Plaintiff's Proposed Amended Findings of Fact, The Contested Property Summary):

hardware

custom software

standard software

Summit Engineering has testified (Defendant's Exhibit G) to another categorization. But note:

a. Exhibit 4 (Bandit-related materials) contains:

no product planning notes

no copies of internal work orders

no copies of customer purchase
orders

no copies of internal sales orders

no labor data

no copies of customer letters

- no assembly instructions
- no chipset creation instructions
- no test procedures
- no fabrication drawings
- no service bulletins
- no software listings
- no flowcharts of software

It does contain:

- roughly 10 bills of material
- schematics
- technical manuals

The bills of material were used by Fields in the course of his work to identify a circuit component from its schematic symbol. This was necessary only because of oversights affecting the readability of the schematics, concerning which Fields spent some time working with drafting to correct.

The schematics were the principal source material for Fields' work,

were included in Fields' work product, were sold as part of Fields' work product as well as separately. (According to Summit, all its schematics include a proprietary notice. But observe that such a notice is not included on the only schematic, that of the 12-214-009-04b POP/IO/LATCH board, forwarded by the trial court. A cursory review of all the schematics included in the exhibits reveals that roughly 1/3 of them do not bear this notice...).

Summit Engineering paid Fields to write technical manuals, copies of which were sold and given away.

Fields kept a copy for himself.

- b. Exhibit 3 (Intelligent Driver related materials) contains principally the same kinds of materials as does Exhibit 4, and software. The documents relating to business activities are incidental, insignifi-

cant, and comprise a minute fraction of the total material; Fields has little interest in such business material and would be willing to give it to Summit as part of a settlement.

2. Reasons why the materials belong to Fields, and why Fields is due overtime compensation, have been noted in the discussion of the procedural issues raised by this appeal.

STATEMENT OF FACTS

The facts have already been presented at length in two documents:

1. The Trial Court's transcript
2. Plaintiff's Post-Trial Motions

What is attempted here is to present this court a very short abstract of these facts.

On approximately September 25, 1978, Fields began his employment with Summit Engineering, a manufacturer of microprocessor controls for motor-driven machinery. On this date he signed an employment contract agreeing to give the company rights to inventions, improvements of inventions, etc. Fields also agreed by that contract not to disclose information that would be to the company's detriment. More than a year later, Fields signed an employee invention and disclosure agreement of similar effect.

During the first two years of his employment, Fields was paid hourly wages; his primary responsibility was to generate technical manuals which the company distributed internally,

to its sales and service force, and to other select individuals such as Northern Montana College. During the remainder of his employment, Fields was paid a monthly salary providing roughly the same income as his hourly wages; his responsibility was expanded to include development, manufacturing, and servicing of the product known as the Intelligent Driver.

During this employment period Fields made voluminous notes. They included principally rough drafts of the documents he was preparing and notes of what he was learning from his job and his contacts with other employees, data books, and other literature available at his place of employment. From these rough notes, Fields completed his technical manuals, which were submitted to the company and kept by the company in its files. Fields also completed a set of notes for himself. The rough drafts were trash-canned once Fields had proof-read the secretarial work.

Fields' supervisor Dan Cheever knew that he was building a personal file such as that just described and that Fields was putting his own time into building it. This file was stored in Fields' office on a set of bookshelves, just as a lawyer keeps his law books. When Fields terminated his employment, he carefully separated his own materials from company materials and left a note for Dan describing this separation. So Dan knew what Fields had taken with him, and yet during the next couple of weeks, during which Fields even agreed to an exit interview, no question was ever raised concerning these materials. Subsequently, Dan requested to borrow one page of Fields' notes. Because this request was made through a third party, it was unclear to Fields what Dan had requested, and so Fields brought in all his notes regarding the last six months of his employment. Summit then decided it had the right to keep these notes.

STATEMENT OF THE CASE

Tom Fields, Plaintiff-Appellant, first filed suit against Summit Engineering, Defendant-Respondent, in the Justice Court, Department No. 1 of the State of Montana, in and for the County of Gallatin. The justice of the peace ruled that Fields take nothing by his complaint, that the material be given to Summit, and that Summit take nothing by their counterclaim.

Tom Fields appealed this decision in the District Court of the Eighteenth Judicial District of the State of Montana, in and for the County of Gallatin. That court reaffirmed the justice court and awarded Summit Engineering its costs. Fields made a motion for a new trial and to amend findings of fact. The court denied this motion.

Fields is appealing these rulings.

CONCLUSION

On the basis of the trial court's record:

1. Fields invested considerable effort,
for which he has not been compensated,
into preparing the contested materials
2. Summit Engineering seeks to deprive
Fields of this material

On the basis of this record, Fields respectfully requests this court to reverse the judgement entered by the trial court and require Summit Engineering to choose to:

1. Either return to Fields the contested property,
2. Or, compensate Fields for the additional effort he invested, as Fields petitioned in a supplemental complaint (figured at time-and-a-half for two hours a day, every day of the two years which Fields worked as an hourly employee and received an average wage of \$6 per hour)

It would then be up to Summit Engineering to decide whether the materials are so confidential that, rather than return them to Fields,

it would rather compensate him for the effort from which it has benefitted in any case.

Respectfully submitted this 22nd day of April, 1982.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 82-96

TOM FIELDS,

Plaintiff-Appellant,

vs.

SUMMIT ENGINEERING,

Defendant-Respondent,

ON APPEAL FROM THE DISTRICT COURT
OF THE EIGHTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR
THE COUNTY OF GALLATIN

(SUBSTITUTE) BRIEF OF PLAINTIFF-APPELLANT

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328 U.S. 687 (1946)

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MCA ANNOTATED, vol. 2, page 398

BALLINGER v. TILLMAN

133 M 369 (1958)

INTRODUCTION

Substitute briefs citing controlling authorities have been ordered by the Chief Justice. The issues have been concisely stated and discussed in earlier briefs. To avoid unnecessary repetition, this brief's concern will be limited to the requested research. It is hoped that this streamlined approach meets the court's approval.

Fields has raised two issues in this case:

1. The contested ownership of notes composed by Fields over a 2 - 3 year period
2. Overtime compensation owed Fields for the composition of these notes

The court has indicated an interest in another issue:

3. The ownership of an employee's work product.

Fields asserts that Issue 3 is largely distinct from Issue 1. The notes themselves attest to this distinction. Fields' work product (original copies of technical manuals) was left with the employer and not included

in Fields' notes. Whereas this work product is typewritten, Fields' notes (except for copies of these manuals) are not. Nor are these notes rough drafts, as evidenced by their author's concern for readability and the absence of pencilled corrections, erasures, scratch-outs, etc., which typically characterize such notes. Nor was Fields required by Summit to make and keep such notes; whereas Summit had designated a repository for Fields' work product (technical manuals), Fields was not similarly asked to keep either notes he needed to compose in creating his work product or the notes which have been contested. In view of these considerations and others which have been previously cited, there is only one consistent interpretation as to the nature of these notes, and that is the interpretation which Fields has held to from the beginning: the contested notes are not part of Fields' work product but are notes he compiled and composed for his own educational purposes.

Fields does not contest the ownership of an employee's work product, and so this issue has not been briefed. Fields does contest the ownership of his notes, and so has cited authorities which support his contention that there is nothing in the agreements he signed which assigns ownership of these notes to his employer.

Fields' claim to overtime compensation has been repeatedly ignored by the court. While the court might be reluctant to recognize that Fields' notes were the product of his study rather than his work, the testimony leaves no room for reasonable doubt that if the notes are ruled Summit's property, then Fields did work overtime and had his employer's permission (even encouragement) to work this overtime.

ARGUMENT: OWNERSHIP

I. INTRODUCTION

Precedents have been discovered that, if followed, give Fields the right to most or all of his notes. Fields' case is even stronger because:

1. Fields had discussed with his employer at the time of hiring and afterwards his educational objectives regarding his employment (Transcript, page 12).
2. Fields' supervisor was aware of his self-study after hours (Transcript, page 146).
3. Fields' supervisor had given him permission to include company material in his self-study (Transcript, page 153).
4. Fields' supervisor promised to return to Fields the notes which Fields loaned to him (Transcript, page 147).
5. Fields' supervisor had every opportunity to review Fields' personal file but never assumed that responsibility (Transcript, page 148).

There is something else unique about this case. Whether or not the notes contain confidential information, they have not been used to enter into competition with Fields' employer.

II. PRECEDENT: UNION SWITCH & SIGNAL CO., v.

SPERRY, March 12, 1909, 169 F.,
page 926

A. This case parallels our case in several more particulars than do other cases. In both cases, the contested material:

1. Includes copies of diagrams, blueprints, etc., some of which were in the public domain
2. Was kept in a so-called personal file.

B. In this case, Judge Martin decided that:

"An employee on the termination of his employment has no right to carry away records or documents containing trade secrets or other confidential information relating to his master's business."

However, Judge Martin also observes:

"Some of the articles involved in this proceeding were photographs and blueprints made public by the complainant (employer) and upon hearing were not urged to be included in the decree."

And so, Judge Martin excepted from his decision exhibits of a public nature:

"...decree that the defendant deliver to the complainant such of the exhibits...as were not of a public nature."

C. Fields testified (Transcript, page 24) that his notes contain papers from other companies, in particular data sheets and application notes which are generally available. Fields further testified (Transcript, page 25) that the general information is known; he demonstrated this by introducing as evidence similar material published by the Apple Computer Company. Fields has also established, by attaching to his post-trial motions, a price list prepared by Summit, that Summit's blueprints and the manuals prepared by Fields have entered the marketplace. Summit has given to Northern Montana College copies of these schematics and manuals (though Summit could not recall if the manuals had accompanied the gift of equipment--Transcript, page 133).

If Judge Martin's precedent had been followed, then most or all of Fields' notes would have been returned to him. This is a tremendously different decision than that of Judge Lessley, who ruled that Fields should take nothing by way of his complaint.

III. PRECEDENT: AMOCO PRODUCTION CO., v. Lindley, Jan. 15, 1980, 609 P 2d, page 734-

A. This case also parallels our case in several more particulars than do other cases.

1. Lindley signed a disclosure agreement.
2. Lindley developed software in which his employer was not interested (In Fields' more modest case, this software was a simple test routine for the product to which he was assigned).
3. "Mr. Lindley was not approached as to ownership until this suit was brought ...manuals of operations were not marked confidential or even numbered to show how many were out and where distributed...this action by AMOCO does not show an exercise of dominion...."
(page 742, col. 1)

4. Mr. Lindley's work at home was closely related to the work he was doing for his employer.

5. "The decision of the trial judge was based on the contract, and the evidence to support a finding of trade secret is simply not in the record."

"It may very well be that AMOCO intended to cover the contingency...in its form contract, but the fact is it did not. It is a common reality that printed contracts will be construed most strongly against the party who prepared them."

B. "In interpreting contract, primary significance is placed on intent of parties at time of contracting...."

Summit's intention was the protection of its products. Fields' intention was his education. Fields' retention of his notes is not inconsistent with these intentions so long as he does not disclose confidential information.

C. "Invention, to be so classified for purposes of determining ownership under the contract, must be patentable...." (page 740, col. 2)

"Invention, in the nature of improvements, is the double mental act of discerning, in existing machines and processes or articles, some deficiency and pointing out the means of overcoming it." (page 740, col. 2)

Neither Summit's products nor Fields' notes are inventions or improvements of inventions. Neither party made any claim that they are. For these reasons, the trial court's quotations from 53 AmJur and 137 U.S. are irrelevant, in which case the decision has been unsubstantiated by law or authority.

- D. "...there was insufficient evidence before the court for a finding of trade secret... some factors to be considered in determining whether given information is one's trade secret...the burden of proving these criteria are on the Plaintiff (he who alleges a trade secret)...like the common law, the contract as it relates to non-disclosure will not aid the Plaintiff here because it deals only with inventions or disclosures...." (page 743, col. 1)

Summit has ignored such criteria.

IV. PRECEDENT: CENTRAL PLASTICS CO., v. Goodson

May 6, 1975, 537 P 2d, page 330

"Trade secrets and confidential information, in order to be protected against disclosure by agreements, must be particular secrets of employer as distinguished from general secrets of the trade...."

"A trade secret must have a substantial element of secrecy."

"...must contain elements which are unique and not generally known or used in the trade."

Has Summit singled out a single example from Fields' notes and applied criteria such as these to it? No.

ARGUMENT: COMPENSATION

I. INTRODUCTION

Fields testified that:

1. His starting pay was \$5.00 per hour (Transcript, page 12).
2. He would typically spend on his notes approximately two hours before work and two hours after returning home (Transcript, page 14).
3. He worked before work, after work, during lunch hours, and during breaks (Transcript, page 27).
4. His claim for \$9,000.00 in overtime compensation was figured at time-and-a-half wages and did not include the time he was salaried (Transcript, page 164).

His wife testified that:

1. He spent every evening, weekend, and morning compiling these notebooks (Transcript, page 72).
2. He often returned to work (Transcript, page 72).
3. He often came home late (Transcript,

page 72).

4. She knew he was working on Summit-related materials (Transcript, page 74).

A co-worker recalled a chance conversation in which Fields indicated that he studied (worked, since Summit claims that his notes are work products) early in the mornings at home before work (Transcript, page 79).

Another co-worker testified that:

1. Fields normally worked through the lunch hour, although she couldn't testify on the nature of that work (Transcript, page 87).
2. Fields was at work by 7:30 AM.

Another co-worker also testified that Fields was coming to work early (Transcript, pages 92 and 95).

Summit could offer no evidence contradicting these facts, except to point out that Fields didn't spend all his free time in compiling these notes. Instead, it has

taken the position that:

1. It doesn't have to pay for unauthorized overtime (Transcript, pages 117- and 122-).
2. Its employee handbook protects it against unauthorized overtime (Transcript, page 113-).
3. Fields didn't previously request compensation for overtime.
4. If Fields chose to work additional hours or different hours, that was his choice (Respondent's Brief, page 19).

The authorities cited below all disagree with Summit's position. Fields' supervisor knew of his self-study. He allowed it (Transcript, page 153). Now Summit claims the only tangible result of this self-study as part of Fields' work product.

II. STATUTES

39-3-206 MCA: "Any employer...who fails to pay any of his employees as provided in this part...shall be guilty of a misdemeanor. A penalty shall also be assessed against and paid by such employer...5% of the wages due and unpaid shall be assessed for each day...upon

which failure continues after the day upon which such wages were due...."

39-3-208 MCA: "Any contract or agreement... the provisions of which violate, evade, or circumvent this part is unlawful and void...."

39-3-402(2) MCA: "Employ means to suffer or permit to work."

39-3-405(1) MCA: "...employee receives compensation for his employment in excess of 40 hours in a work-week at a rate of not less than $1\frac{1}{2}$ times the hourly wage rate at which he is employed."

24.16.1002(1) Admin. Rules: "...Section 39-3-40J MCA prohibits their employment for more than 40 hours per week without proper overtime compensation."

24.16.1002(2) Admin. Rules: "By statutory definition the term 'employ' includes (Section 39-3-402(2) MCA) to suffer or permit to work."

24.16.1004 Admin. Rules: "The principles are applicable even though there may be a custom, contract, or agreement not to pay for time so spent."

24.16.1005(3) Admin. Rules: "...duty of management to exercise its control... it cannot sit back and accept the benefits without compensating for them."

24.16.2511(1) Admin. Rules: "...overtime must be compensated at the rate not less than one and one-half times the regular rate..."

24.16.2512(2) Admin. Rules: "...the law does not require employers to compensate employees on an hourly rate basis ...in such case the overtime compensa-

tion due to employees must be computed on the hourly rate derived therefrom..."

- 24.16.2524(1) Admin. Rules: "...an employee must be compensated for all hours worked ...and all time during which an employee is suffered or permitted to work whether or not he is required to do so."

Similar citations appear in other relevant statutes, particularly the FLSA (Fair Labor Standards Act). It is hoped the court will understand if they are not repeated here.

III. PRECEDENT: ANDERSON v. MT CLEMENS POTTERY CO., June 10, 1946, 328 U.S., page 687-

"...where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work...an employee has carried out his burden of proof if he proves that he has in fact performed such work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to

produce such evidence, the court may then award damages to the employee, even though the result be only approximate."

"...And even where the lack of accurate records grows out of a bona fida mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work ...Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages..."

"...it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

See too 56 CJS 160(8), page 79 and 48A AMJ

2d 2482, page 705-.

IV. PRECEDENT: HANDLER v. THRASHER, June 27,

1951, 191 F. 2d, page 120-

"The parties entered into a written agreement...it was provided that no overtime work should be performed on the lease without the direction of the appellant, and that no compensation would be paid for the overtime work unless the appellee furnished a statement therefore to the appellant...and that in the event unauthorized compensation was claimed, it would not be paid. The appellee worked under this contract, without claiming overtime compensation, until he was discharged." (page 121, col. 2)

"...where he proves that he has in fact performed work for which he has not been compensated, and produces evidence to show the amount and extent of that work, the

burden then shifts to the employer..."
(page 122, col. 2)

"...the employee agreed not to work more than eight hours a day...But it is too well settled to admit of discussion that a contract which has for its purpose, or which has the effect of circumventing or invading the command of the Wage and Hour Act, is invalid and inenforceable...the employee worked more than eight hours a day, the employer knew it...worked overtime with the knowledge, consent, and co-operation of the employer."

ARGUMENT: RULE 52(a)

I. TRIAL COURT'S FAILURE TO MAKE FINDINGS IS GROUNDS FOR REVERSAL.

The trial court allowed Fields to proceed with his supplemental complaint, but then cited no facts in support of its decision that Fields should be denied compensation ("...take nothing by way of his complaint.")

Rule 52(a) of Civil Procedure requires the trial court to make such findings:

"The court shall find the facts...and state...its conclusions of law thereon."

MCA Annotated, vol. 2, page 398, cites a precedent for invoking this rule:

"Failure to Make Findings as Grounds for Reversal: Upon proper request it is the duty of the District Court to make findings, in the absence of which the cause presents grounds for reversal."
(Ballinger v. Tillman, 133M369(1958))

II. TRIAL COURT'S FINDINGS ARE IN ERROR.

Rule 52(a) of Civil Procedure does not require Findings of Fact to be set aside unless clearly erroneous. Fields singled out several obvious errors in his post-

trial motions, yet the court refused to correct them. The errors reflect a basic unfamiliarity with the contested materials. Such an unfamiliarity is due to the court's refusal to closely scrutinize the materials, as exemplified by Judge Lessley interfering with Fields' attempts to adequately describe the materials (Transcript, pages 22, 60, and 94).

CONCLUSION

The trial court has ignored the testimony, the exhibits, and the law. It is clear that Fields prepared the contested notes for his own educational benefit. It is less clear why Summit has sought to possess these notes. Nevertheless, it is possible that Summit's concern is genuine.

There is really only one question to be settled: does Fields get back his notes, compensation, or both? Certainly, in either case, Fields should be awarded a penalty and attorney fees for the trouble Summit has caused him

and for withholding from him compensation,
be it in the form of notes or wages.

Respectfully submitted this 30th day of July,
1982.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 82-96

TOM FIELDS,

Plaintiff-Appellant,

vs.

SUMMIT ENGINEERING,

Defendant-Respondent.

On Appeal from the District Court
of the Eighteenth Judicial District
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the County of Gallatin

(2nd) PETITION FOR REHEARING

and

MOTION TO SUSPEND RULES

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(2nd) PETITION FOR REHEARING

I. ARGUMENT

The pages which follow are copies of documents which prove absolutely that this Court has erred in its dismissal of Fields' appeal and denial of Fields' petition for rehearing. The first document establishes the date of entry of judgement. The second proves that Fields' motion was timely. The third proves that the notice of hearing on the motion was issued. The fourth is the document which expanded upon Fields' motion, and which caused Summit Engineering to request a continuance. Following the continuances are copies of Rule 5 of Appellate Civil Procedure and Rule 52(b) of Civil Procedure. In connection with these rules, it must be noted that no notice granting or denying the motion under Rule 52(b) was mailed by the Clerk until February 2, 1982. In conclusion, the full time for appeal fixed by Rule 5 did not commence to run until February 2, 1982.

It is apparent that the Court has erred because it has drawn upon its vast general knowledge of the law, rather than referring directly to the law. This is precisely the kind of oversight Fields has repeatedly begged the courts to correct.

It is Fields' hope that the Court will regain some of the respect it has lost, by its handling of this case, by granting this petition (and/or rescinding its denial of Fields' first petition).

IN THE DISTRICT COURT
 OF THE EIGHTEENTH JUDICIAL DISTRICT
 OF THE STATE OF MONTANA IN AND FOR
 THE COUNTY OF GALLATIN

* * * *

TOM FIELDS,)

Plaintiff)

v.)

No. 27689

SUMMIT ENGINEERING,)

Defendant.)

* * * *

NOTICE OF ENTRY OF JUDGEMENT

TO: TOM FIELDS AND KEVIN VAINIO YOUR ATTOR-
 NEY OF RECORD

Please take notice that judgement was duly
 given, made, rendered and entered in this ac-
 tion on the 6th day of November, 1981, in fav-
 or of defendant and against plaintiff.

Mark A. Bryan
 11 E. Main, P.O. Box
 1371
 Bozeman, MT 59715

Attorney for Defendant

Nov 17, 1981

IN THE DISTRICT COURT OF THE EIGHTEENTH
JUDICIAL DISTRICT OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF GALLATIN

TOM FIELDS,

Plaintiff

-vs-

No. 27689

SUMMIT ENGINEERING,

Defendant.

MOTION FOR AMENDMENT OF FINDINGS AND FACT

Comes now the plaintiff, advised by the Bureau Chief of the Labor Standards Division (Mike Stump) and former Labor Standards Division attorney (Mayo Ashley), to move for amendment (clarification) of findings and fact necessary before issues can be considered by Labor Standards Division or appellate body.

Plaintiff has been advised by his lawyer, Kevin E. Vainio, to cite Rule 52(b) of the Montana Rules of Civil Procedure as basis for this motion.

DISTRICT COURT MINUTES: NOVEMBER 20, 1981

TOM FIELDS,

Plaintiff

-vs-

No. 27689

SUMMIT ENGINEERING,

Defendant.

The Plaintiff's Motion is acknowledged
and set for hearing on MONDAY, DECEMBER 21,
1981 at 11:30 o'clock A.M.

LORRAINE VanAUSDOL, CLERK

By Eleanor Stark, Deputy

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IN THE DISTRICT COURT OF THE EIGHTEENTH
JUDICIAL DISTRICT OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF GALLATIN

TOM FIELDS,

Plaintiff

-vs-

No. 27689

SUMMIT ENGINEERING,

Defendant.

PLAINTIFF'S POST-TRIAL MOTIONS

Comes now the plaintiff, advised by the Bureau Chief of the Labor Standards Division (Mike Stump) and former Labor Standards Division attorney (Mayo Ashley), to move for amendment (clarification) of findings of fact necessary before issues can be considered by the Labor Standards Division or appellate body.

Plaintiff has been advised by his former attorney, Kevin E. Vainio, to cite Rule 52(b) of the Montana Rules of Civil Procedure as basis for this motion.

DISTRICT COURT MINUTES: Dec. 18, 1981

TOM FIELDS,

Plaintiff,

-vs-

No. 27689

SUMMIT ENGINEERING,

Defendant.

Upon request of Mark Bryan and Tom Fields,
the hearing on plaintiff's motion set for
Monday, Dec. 21, 1981 at 11:30 A.M. is here-
by continued and reset for Monday, Jan. 4,
1982 at 10:00 A.M.

LORRAINE VanAUSDOL, Clerk

DISTRICT COURT MINUTES: JANUARY 4, 1982

TOM FIELDS,

Plaintiff,

-vs-

No. 27689

SUMMIT ENGINEERING,

Defendant.

The hearing on the Plaintiff's Motion in
the above entitled cause is hereby CONTINUED
WITHOUT DATE.

LORRAINE VanAUSDOL, CLERK

By Eleanor Stark, Deputy

DISTRICT COURT MINUTES: January 12, 1982

TOM FIELDS,

Plaintiff,

-vs-

No. 27689

SUMMIT ENGINEERING,

Defendant.

The hearing on Plaintiff's Motion for New Trial and to Amend Findings in the above-entitled cause is set for Monday, the 1st day of February, 1982 at 10:00 o'clock A.M. before Judge W. W. Lessley.

LORRAINE VanAUSDOL, CLERK

By Ruth Metcalf,

Chief Deputy

RULES OF APPELLATE CIVIL PROCEDURE

Rule 5. Time for filing notice of appeal.

"...The running of the time for filing a notice of appeal is suspended...and the full time for appeal fixed by this rule commences to run and is to be computed from mailing by the clerk of notice of the entry of any of the following orders made upon a timely motion under such rules: ...granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgement would be required if the motion is granted...."

RULES OF CIVIL PROCEDURE

Rule 52(b). Amendment.

"Upon motion of a party made not later than 10 days after notice of entry of judgement the court may amend its findings or make additional findings and may amend the judgement accordingly...."

MOTION TO SUSPEND RULES

The need to suspend rules, cited in Fields' first petition, has been clearly exemplified by this Court's error in dismissing Fields' appeal and denying Fields' first petition. It is imperative that this case, whose merits are less clear-cut than those of this petition, not be treated superficially. If it is, then of course the Court will rule in favor of Summit Engineering for the obvious reasons that Fields was employed by Summit Engineering, Fields signed an employee disclosure agreement, Summit's name appears on 3-ring notebooks and other materials. If it is not, then the Court will take notice of how Summit Engineering came into possession of the material, of how this case originated, of what the employee disclosure agreement does and does not say, of Fields' openness concerning the notebooks during his employment, of his requesting permission to study company material for his own education, of Summit Engineering's failure to compensate Fields for

overtime it could have easily observed him working, of Summit Engineering's putting Fields on salary immediately following his first request for overtime compensation, of Summit's wrongfully informing Fields that salaried employees are expected to work overtime without compensation, of Summit's misrepresentation of the materials, of Summit's misrepresentation of facts, of case precedents and controlling authorities, etc.

There is only one reasonable way to decide Fields' case, and that is for this Court to require Summit Engineering to answer (admit or deny) each of the facts cited by Fields in his post-trial motions, apply the standards available to the Court, and apply the case precedents and other legal authorities which have been presented.

Finally, there can be only one just way for this Court to hand down its decision, particularly in light of its errors and the complexity of this case, and that is by addressing each of the questions which have been raised

and by allowing both parties an opportunity to challenge the Court on each point. Only in this way can the Court demonstrate that its deliberation has reached the depth required for a fair and honest settlement.